

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Joint Application of TeleCommunication  
Systems, Inc. d/b/a Maryland  
Telecommunications Systems, Inc. (U7083C)  
and Comtech Telecommunications Corp. and  
Typhoon Acquisition Corp., a wholly owned  
Subsidiary of Comtech for Approval of the  
Transfer of Control of TeleCommunication  
Systems, Inc.

Application 16-02-011

**BRIEF OF TELECOMMUNICATION SYSTEMS, INC. D/B/A MARYLAND  
TELECOMMUNICATIONS SYSTEMS, INC. ("TCS"), AND COMTECH  
TELECOMMUNICATIONS CORP. AND TYPHOON ACQUISITION CORP., A  
WHOLLY OWNED SUBSIDIARY OF COMTECH**

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Acquisition Corp., a wholly owned subsidiary of Comtech

Dated: August 10, 2016

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WHOLLY OWNED SUBSIDIARY OF COMTECH**

Pursuant to the July 15, 2016 Joint Ruling<sup>1</sup> in the above captioned proceeding,  
TeleCommunication Systems, Inc. d/b/a Maryland Telecommunications Systems, Inc. (“TCS”),  
and Comtech Telecommunications Corp. and Typhoon Acquisition Corp.<sup>2</sup>, a wholly owned  
subsidiary of Comtech (collectively, “Joint Applicants”) respectfully submit this brief addressing  
the issues set forth by the Assigned Commissioner and Administrative Law Judge.

**I. SUMMARY AND INTRODUCTION**

In the Joint Ruling, the Joint Applicants were directed to respond to these inquiries:

1. Why does the July 7, 2016 notice (filed pursuant to Ordering Paragraph 5 of the Commission’s June 23, 2016 D.16-06-048), indicate that the purchase transaction ‘was consummated on February 23, 2016’ – only six days after the Application was filed, and during pendency of the proceedings herein? and
2. Why Applicants should or should not be subject to a fine under Section 2107, for the period of 121 days from February 23, 2016 to June 23, 2016, for disregarding the provisions of Section 854?

As described below, TCS holds certification as a competitive local exchange carrier  
 (“CLC”) pursuant to Federal Communications Commission (“FCC”) rules for the purpose of

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<sup>1</sup> *Joint Ruling of Assigned Commissioner and Administrative Law Judge Setting Prehearing Conference and Phase Two Penalty Proceeding* (Jul. 15, 2015).

<sup>2</sup> Subsequent to the transfer, Typhoon Acquisition Corp. merged into TCS and TCS survived the merger and is now a direct subsidiary of Comtech.

acquiring pseudo Automatic Number Identifier (“p-ANI”)<sup>3</sup> numbering resources necessary to operate as a VoIP Positioning Center (“VPC”) provider enabling VoIP and wireless carriers to provide 9-1-1 data services in California. TCS does not provide (or offer) any regulated services in California.

Consistent with the Commission’s established criteria set forth in D.98-12-075<sup>4</sup> for determining penalties, the Commission should consider two important mitigating factors. First, the Joint Applicants exhibited good faith by consulting with members of the CPUC Staff prior to filing the Joint Application and, although it resulted in a delay, followed the CPUC Staff’s recommendations (consistent with Commission precedent) when filing the Joint Application. Second, TCS’s data services promote an important public service goal of the Commission<sup>5</sup> by enabling access to Enhanced 9-1-1 (“E9-1-1”), and a penalty in this matter could have a chilling effect on this important goal.

## **II. DESCRIPTION OF TELECOMMUNICATION SYSTEMS, INC. D/B/A MARYLAND TELECOMMUNICATION SYSTEMS, INC. (“TCS”)**

### **A. TCS is a VPC that provides essential non-regulated managed services that enable other carriers to provide 9-1-1 service in California.**

TCS provides managed services to interconnected VoIP providers so that they will deliver 9-1-1 calls to the appropriate Public Safety Answering Point (“PSAP”). TCS’s services are also targeted to large wireless carriers, cable TV system operators who provide

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<sup>3</sup> “A p-ANI is a number, consisting of the same number of digits as an Automatic Number Identification (ANI), that is not a NANP telephone directory number and may be used in place of an ANI to convey special meaning to the selective router, PSAP, and other elements of the 911 system.” *See IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10252-53, para. 17 (2005) (VoIP 911 Order); 47 C.F.R. § 9.3.*

<sup>4</sup> D.98-12-075, *Rulemaking to Establish Rules for Enforcement of the Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates Adopted By the Commission In Decision 97-12-088*, 1998 Cal. PUC LEXIS 1016 (Dec. 17, 1998).

<sup>5</sup> D.13-07-019 at p. 6 (“The Commission has long been a steadfast supporter of California’s 9-1-1 system and been committed to promotion of that 9-1-1 system in the sea of ever changing technological advances to provide critical public safety protection to California’s telecommunications consumers.”)

telecommunications services and/or VoIP, telemetric operators, and PBX users. In order to provide its services TCS requires access to p-ANI. Until recently, VPCs required certification from state Public Utility Commissions (“PUCs”) in order to obtain p-ANI numbering resources. The FCC recently revised its rules to allow VPCs to directly secure p-ANI codes in those states where VPC providers cannot obtain PUC certification as a VPC.<sup>6</sup> TCS currently provides the following non-regulated services in California: text to 911 services to California PSAPs; routing of wireless and VoIP calls; and 9-1-1 caller location services.

**B. TCS does not offer any regulated services in California.**

TCS does not offer regulated services such as transport, long distance voice toll services, or local exchange voice dial tone services to residential or business customers.<sup>7</sup> TCS participates in Next Generation 9-1-1 (“NG9-1-1”) Requests For Proposals (“RFPs”) in various states. When such an RFP arises, the Company will submit a Proposal and, if selected, negotiate a contract. In California, there is currently an open statewide Emergency Services IP network (“ESInet”) RFP. To date, TCS has not been selected or entered into a contract to provide any such services in California. Pursuant to the current bidding process, even if TCS is selected for the bid (and enters into a contract) it may not be required to provide regulated services in California.<sup>8</sup>

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<sup>6</sup> *In the Matter of Numbering Policies for Modern Communications; IP-Enabled Services; Telephone Number Requirements for IP-Enabled Services Providers; Telephone Number Portability; Developing a Unified Inter-carrier Compensation Regime; Connect America Fund; Numbering Resource Optimization*, 30 FCC Rcd 6839, 6881-82 (June 22, 2015).

<sup>7</sup> As described in the section directly below, in its Joint Application, TCS stated that it “aggregates and transports emergency local, VoIP, telemetric, PBX, and mobile E9-1-1 traffic” in California. Joint Application at p. 3. This was a generalization. The Company should have noted that it provides transport service in other states, but it does not do so in California.

<sup>8</sup> The ESInet RFP process is complex, and TCS is not currently the lead bidder, but is a subcontractor to a major carrier. The carrier would provide regulated transport, and TCS would provide ancillary data, routing, and location services.

### III. DISCUSSION

#### A. TCS is neither a Public Utility nor a Telephone Corporation under California law.

Under Section 216(a) of the California Public Utility Code a Public Utility, “includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.”<sup>9</sup> Under Section 234(a) a telephone corporation “includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.”<sup>10</sup>

In its Joint Application, TCS stated that it “aggregates and transports emergency local, VoIP, telemetric, PBX, and mobile E9-1-1 traffic” in California.<sup>11</sup> This was a general reference to TCS operations nationwide. Unfortunately, it had the unintended effect of overstating TCS’s operations in California. While TCS does provide transport service in other states, it does not provide any transport service in California. Thus, TCS does not provide any regulated services in California and only provides the services described in Section II.A, above. TCS has reported \$0.00 gross intrastate revenue in California for each year on its Annual User Fee Statement.<sup>12</sup> Thus, TCS does not own, control, operate or manage any telephone line for compensation within California and is therefore not a telephone corporation or a Public Utility. It is the Joint

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<sup>9</sup> Cal. Pub. Util. Code §216(a).

<sup>10</sup> Cal. Pub. Util. Code §234(a).

<sup>11</sup> Joint Application at p. 3. The mistake was discovered during preparation of this Brief. Counsel for TCS contacted CPUC Counsel to discuss the regulatory and jurisdictional aspects of the Joint Application. On August 1, 2016 a TCS engineer and CPUC Staff Engineer participated in a conference call to discuss the specific services that TCS provides in California and whether those services are regulated by the Commission.

<sup>12</sup> A copy of the Company’s 2016 Annual User Fee Statement is included as Attachment 1. The Company’s report for each previous year also reported \$0.00 gross intrastate revenue.

Applicants' position that this status diminishes the public policy impact and distinguishes the regulatory precedent of its requested relief in this matter.

**B. Given the Timing of the Transaction, the Joint Applicants used Best Efforts to Coordinate a Proper Filing with the Commission.**

The Agreement and Plan of Merger ("Agreement") that is the subject of this proceeding was a complex and comprehensive agreement that covered forty-three state authorities, multiple banks and financial institutions, the subject corporations, and impacted thousands of public shareholders and over 2,000 employees. The competing interests and requirements of federal and state regulators, significant transaction and financing costs, customers and business partners craving continuity of operations, shareholders demanding fair value, and employees concerned about their futures created an ocean of uncertainty. While complexity in and of itself is no excuse, TCS would note that the culmination of the merger resulted in the termination of its existence as a publically traded entity – a monumental event in the life of any company. TCS attempted to satisfy all parties and all interests, and continues in that spirit with this filing.

The Joint Applicants filed an Application with the FCC on December 17, 2015. The FCC approved the Application on February 3, 2016.<sup>13</sup> Counsel for Joint Applicants had multiple conversations with CPUC Staff members from the Communications Division and the Legal Counsel's Office in December 2015 and in January and February of 2016. The Joint Applicants were originally advised by CPUC Staff that an Advice Letter would be the appropriate and quickest way to obtain merger review. However, upon follow-up discussions, the Joint Applicants were advised that the Advice Letter process was inapplicable to the transaction and

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<sup>13</sup> C-band, FCC File No. SES-T/C-20151216-00941 and, Ku-band VSAT, FCC File No. SES-T/C-20151216-00942.

were instructed to file an Application.<sup>14</sup> Thus, the filing date was impacted by good faith consultation with members of the CPUC Staff.

**C. To the extent the Commission has jurisdiction over TCS to assess a penalty, public policy and existing Commission precedent confirms that it need not assess a penalty under Section 2107 of the California Public Utilities Code.**

TCS provides managed services to telecommunications carriers that are crucial to the public interest for access to E9-1-1. Although TCS does have CLC authority, as explained above, the Company sought that authority in accordance with industry practice to acquire p-ANI numbering resources. TCS does not provide (or offer) regulated services.<sup>15</sup> For these reasons, and as is further argued below, the Joint Applicants respectfully argue that, given the facts of this case as applied to the Commission's existing precedent, the Commission should decline to assess a penalty, or impose only the minimum amount, in this matter. Consistent with the established criteria that the Commission set forth in D.98-12-075 for determining penalties, the Commission should also consider a number of mitigating factors.

**1. Severity of the Offense**

The Commission has indicated that it looks to three factors: economic harm, physical harm, and harm to the integrity of the regulatory process to measure severity. Violations that caused physical harm are generally considered to be the most severe.<sup>16</sup> Here, there may be a mutual inadvertent technical inconsistency, but no physical or even economic harm to anyone. TCS does not provide any service directly to end-user customers. With respect to the integrity of the regulatory process, TCS has exhibited deference to both the spirit and operation of that process by seeking advance clarification of the Commission's rules on multiple occasions. While the Company is certificated as a CLC, the services TCS provides in California are non-

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<sup>14</sup> See footnote 18.

<sup>15</sup> See Attachment 1.

<sup>16</sup> D.98-12-075 at p. 15.

regulated, managed services that fall squarely within the public's interest to encourage access to E9-1-1. Thus, TCS demonstrated deference to California's regulatory process by seeking approval of the transfer of its services. To the extent the Commission finds that TCS is a Public Utility, the Joint Applicants respectfully argue that the technical violation should be mitigated by these and other factors.<sup>17</sup>

## **2. Conduct of the Utility**

As to the subject entity's conduct, the Commission looks at three factors: the utility's actions to prevent a violation; the utility's actions to detect a violation; and the utility's actions to disclose and rectify a violation. Specifically, given the information the Joint Applicants had at the time, the Joint Applicants attempted to fully comply with Section 854 of the California Public Utilities Code. Once the Joint Applicants were advised that a formal application was required, the Joint Applicants sought accelerated review and filed a comprehensive application.<sup>18</sup> The Joint Applicants notified the Commission that the Agreement was scheduled to close on February 23, 2016.<sup>19</sup> Joint Applicants have not previously been found to have violated or failed to comply with the Commission's rules or laws. Finally, neither of the Joint Applicants are rate-regulated and/or incumbent telephone corporations, over which the Commission typically applies greater scrutiny.

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<sup>17</sup> See D.10-03-008 at p. 9 ("Applicants' violation of § 854(a), while serious, did not cause any physical or economic harm to others. Further, the violation of § 854(a) affected few, if any, consumers, and is a single offense. The only factor that indicates the violation should be considered a grave offense is our general policy of according a high level of severity to any violation of the Public Utilities Code. However, this factor must be weighed against the other factors in determining the amount of the fine.")

<sup>18</sup> To the extent that a transfer application involves a single certificated entity, as opposed to two certificated entities, this should not result in a more complex analysis or delayed decision as it would create a logical inconsistency for prospective applicants. This policy technicality apparently resulted in some confusion for the Staff as evidenced by the delay in providing process advice to TCS. This delay should not be counted against the good faith efforts of Staff to remain consistent with prior Commission decisions, nor should it likewise penalize TCS.

<sup>19</sup> Joint Application, p. 7. Counsel for the Joint Applicants also conveyed this fact with CPUC Staff prior to the filing of the Joint Application.

### **3. Financial Resources of the Utility**

With respect to a potential penalty, the Commission must balance the need for deterrence with the constitutional limitations on excessive fines.<sup>20</sup> The Commission has previously looked to regulated revenues in determining the amount of penalty.<sup>21</sup> While the Joint Applicants are well capitalized companies<sup>22</sup>, TCS has **never** received regulated revenue in California for the provisioning of regulated services.

### **4. Totality of the Circumstances in Furtherance of the Public Interest**

Next, the Commission will look to facts that mitigate or exacerbate the degree of wrongdoing, evaluated from the perspective of the public interest.<sup>23</sup> The Joint Applicants consulted in good faith with members of the CPUC in order to determine the correct notice requirements for a complex multi-jurisdictional Agreement.<sup>24</sup> As a provider of non-regulated managed services that assist companies that provide 9-1-1 services to the citizens of California, TCS performs a service that is vital to the public interest, and a penalty in this matter could countermand that interest.

### **5. The Role of Precedent**

The Joint Applicants are not aware of any precedent where the Commission assessed a penalty on a company that solely offers non-regulated services. In most cases involving Public Utility telecommunications carriers, the Commission has imposed penalties of \$5,000 or less for

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<sup>20</sup> D.98-12-075 at p. 17.

<sup>21</sup> See D.00-12-053 at p. 12 (finding that insignificant regulated revenues was a factor that suggested that a “relatively small fine could effectively deter the Applicants from future violations of the California Public Utilities Code.”); See also, D.04-12-058 at p. 18 (comparing Cingular’s total revenue to its revenue derived from its California customer base).

<sup>22</sup> See Exhibits J-L of the Joint Application.

<sup>23</sup> D.98-12-075 at p. 17.

<sup>24</sup> As noted above, TCS believes the Staff operated with complete integrity, in good faith, and exercised reasonable judgment when suggesting the abbreviated review process. It is TCS’s position that this should be a mitigating factor when weighing the merits of its mitigation arguments.

unauthorized transfers of control of a competitive local carrier.<sup>25</sup> In D.10-03-008 which involved the transfer of a competitive telecommunications company that occurred approximately one month after the applicants had filed their Section 854 application, the Commission imposed a penalty, noting that, while serious, the violation “was not a particularly severe offense” and the Applicant’s conduct “was not egregious.”<sup>26</sup> In assessing a fine, the Commission stated: “Applicants’ violation of § 854(a), while serious, did not cause any physical or economic harm to others. Further, the violation of § 854(a) affected few, if any, consumers, and is a single offense.”<sup>27</sup>

In D.14-06-004, the Commission assessed a penalty of \$130,000.00 on a Public Utility telecommunications carrier; however, that carrier was found to have willfully and knowingly failed to acquire authorization and misrepresented the nature and complexity of the proposed transaction. In part, compared to their state filing, the Applicants provided “substantially more information about the nature and complexity of the transaction when they described it to the FCC.”<sup>28</sup> Further, the Applicants disclosed their intention to violate § 854(a) in a letter of notification to the ALJ.<sup>29</sup> The Applicants consummated the transaction even though the ALJ informed the Applicants of the consequences of their impending action.<sup>30</sup>

None of those facts are present here. TCS filed its Application with twelve exhibits that thoroughly presented the entire scope of the Agreement, the management teams, financials and the pre and post corporate organizations. The Company consulted with the Commission Staff,

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<sup>25</sup> See, e.g., D.10-03-008; D.05-08-006; D.04-04-017.

<sup>26</sup> D.10-03-008 at p. 10-11.

<sup>27</sup> Id. at p. 9; See also D.03-05-033 (Where the Commission imposed a \$5,000 penalty, where a transfer of control occurred six days after filing an application for Section 854(a) approval for an indirect transfer of control of a competitive local exchange carrier and where the parties did not notify the Commission that such transfer had occurred).

<sup>28</sup> D.14-06-004 at p. 7.

<sup>29</sup> Id. at p. 11.

<sup>30</sup> Id. at p. 8.

received and followed instructions in good faith and initially expected to provide the requisite notice via an Advice Letter. Given the scope of the Agreement, the Company proceeded as quickly as it could once it received instructions that the Commission required an Application.

#### **IV. CONCLUSION**

For the foregoing reasons, Joint Applicants respectfully submit that to the extent that the Commission determines that TCS is a Public Utility, and an Application was required, it should find that the delay caused by good faith reliance in a unique circumstance had a de minimis effect on regulatory integrity, and should defer a penalty or impose the smallest requisite penalty consistent with its precedent for similar factual situations.

Respectfully submitted, this 10<sup>th</sup> day of August 2016

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